

TO: Hon. Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and
Procedure

FROM: W. Eugene Davis, Chair
Advisory Committee on Federal Rules of Criminal
Procedure

SUBJECT: Report of the Advisory Committee on Criminal
Rules

DATE: May 10, 2001

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 25-26 in Washington, D.C. and acted on the proposed restyling of the Rules of Criminal Procedure and on proposed substantive amendments to some of those rules. The Minutes of that meeting are included at Appendix E.

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IV. ACTION ITEM—Approval and Forwarding to Judicial Conference of Amendments to Rules 5, 5.1, 10, 12.2, 12.4, 26, 30, 35, and 43 in the Substantive Package (Appendix B)

A. The Substantive Package of Amendments—An Overview

In June 2000, the Standing Committee approved publication of a separate package of amendments, known as the "substantive" package. That package originally consisted of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which all provide for significant changes in practice. This version of the package includes not only the restyled version of the rule but also the language that would effect the change in practice. The Committee Notes reflect those changes and a "Reporter's Note" explained to the public that another version of each of these rules (which includes only style changes) was being published simultaneously in a separate package.

The Advisory Committee received approximately 80 written comments, and heard the testimony of five witnesses, on the proposed substantive amendments. Most of the comments focused on the proposed amendments to Rules 5, 10, and 26, which would provide for video teleconferencing of initial appearances and arraignments and for video transmission of trial testimony. Those comments and testimony are summarized by rule at Appendix C.

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C. Rule-by-Rule Summary of Post-Publication Changes to the "Substantive" Package

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8. Rule 35. Correcting or Reducing Sentence

Rule 35 contains several changes. First, as noted, *supra*, the published version of Rule 35 used the term "sentencing" to describe the triggering element for the two "time" requirements in the rule. While the rule was out for public comment, and at the suggestion of the Standing Committee, the Advisory Committee discussed the issue of further defining or clarifying the term "sentencing." The Committee's initial decision was to use the term "oral announcement of the sentence." That is the view of the majority of the courts that have addressed the issue. Upon further reflection, however, the Committee decided to add a new provision (now Rule 35(a)) and define sentencing as the entry of the judgment. Even though that may result in the change in practice in some circuits, it is more consistent with describing the triggering event, for example, of an approval of a sentence.*

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* At the request of the Advisory Committee on Criminal Rules, the Committee on Rules of Practice and Procedure agreed at its June 7-8, 2001, meeting to withdraw the proposal defining "sentencing" as the entry of the judgment. The Committee also agreed with the advisory committee's recommendation to publish the withdrawn proposal for public comment.

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE***

Rule 35. Correcting or Reducing a Sentence**

1 **(a)** **Definition.** For purposes of this rule, "sentencing"
2 means the entry of the judgment.

3 ~~(a)~~ **(b)** **Correcting Clear Error.** Within 7 days after
4 sentencing, the court may correct a sentence that
5 resulted from arithmetical, technical, or other clear
6 error.

7 ~~(b)~~**(c)** **Reducing a Sentence for Substantial Assistance.**

8 * * * * *

9 **(4) *Below Statutory Minimum.*** When acting
10 under ~~Rule 35(b)~~ Rule 35(c), the court may

* New matter is underlined and matter to be omitted is lined through.

** The rule includes proposed amendments approved by the Judicial Conference's Committee on Rules of Practice and Procedure in June 2001 and forwarded to the Judicial Conference for its consideration. The amended rule takes effect on December 1, 2002, if approved by the

Conference and Supreme Court, and Congress takes no action otherwise on it.

- 11 reduce the sentence to a level below the
12 minimum sentence established by statute.

COMMITTEE NOTE

In 2000, the Committee proposed several substantive changes to Rule 35 and published those proposed changes for public comment. After further review, the Committee determined that some attention should be given to the definition of "sentencing," the term used in the published revised rule. As a result of those discussions, the Committee has proposed that the rule be further amended to include a definition of "sentencing" in revised Rule 35(a).

In particular, the current version of Rule 35(c) permits the sentencing court to correct errors in the sentence if the correction is made within seven days of the "imposition of the sentence." Current Rule 35(b) also permits the court to reduce a sentence for the defendant's substantial assistance within one year after "the sentence is imposed." Although the term "imposition of sentence" was not defined in the rule, the courts that addressed the issue were split. The majority view was that the term meant the oral announcement of the sentence and the minority view was that it meant the entry of the judgment. *See United States v. Aguirre*, 214 F.3d 1122, 1124-25 (9th Cir. 2000) (discussion of current Rule 35(c) and citing cases). During the restyling of all of the Criminal Rules in 2000 and 2001, the Committee determined that the uniform term "sentencing" throughout the entire rule was the more appropriate term. Upon further reflection, and after the rule was published for comment, the Committee decided that it should resolve the conflict in the circuits by defining "sentencing" — for purposes of Rule 35 — as the point

when judgment is entered. The Committee reached that decision for two reasons. First, the triggering event for appeal under Federal Rule of Appellate Procedure 4(b)(1)(A) is the entry of the judgment and a different triggering event for purposes of Rule 35 is confusing and a trap for the practitioner. Second, in many cases, more than seven days elapse after oral announcement of the sentence before the court enters the written judgment. In those cases, if the judge misspeaks or makes a technical error in announcing the sentence, no party can call the error to the attention of the judge and thus, the judge cannot correct that error because more than seven days has elapsed. This results in a significant number of appeals where conflicts exist between the oral announcement of the sentence and the sentence reflected in the written judgment but the sentencing court has no opportunity to declare which version of the sentence it intended to impose.